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In The

Supreme Court of the United States

October Term, 1983

ROBERT D. KEARNEY,

Petitioner,

vs.

WARREN EHRICHS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 25, 1984

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QUESTION PRESENTED

(1) Whether the Eighth Circuit Court of Appeals' decision ordering entry of judgment in favor of respondent based on a theory impliedly tried by the parties in the district court presents a substantial federal question?

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Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review of the decision of the United States Court of Appeals for the Eighth Circuit in this case. This Brief in Opposition is submitted pursuant to Rule 22 of the United States Supreme Court.

STATEMENT OF THE CASE

Respondent is the former owner and founder of Ehrichs Manufacturing Company in Fargo, North Dakota. On April 20, 1979, The Fargo National Bank, the major creditor of the company, commenced foreclosure proceedings against the Company. Before liquidating the corporation's assets, the Bank assigned its position as secured-party-in-possession to petitioner Robert Kearney. Petitioner and respondent then negotiated with each other about joint ownership and continued operation of Ehrichs Manufacturing. These negotiations were unsuccessful (the parties differ over the reasons), and petitioner proceeded to liquidate the corporation. Although a substantial surplus was realized in the liquidation, nothing was paid to respondent for his equity in the corporation.

Respondent then commenced an action against petitioner in Cass County District Court, North Dakota. Petitioner removed the case to federal district court. In his Complaint, respondent principally sought an accounting for the surplus from the liquidation under the Uniform Commercial Code, or recovery under the equitable doctrines of quasi-contract and unjust enrichment. In anticipation of a defense by petitioner that the parties had a valid contract abrogating respondent's right to the surplus, respondent sought relief from that contract on a variety of theories, including rescission and fraud.

As anticipated, petitioner argued that the parties had made a valid contract, in which the stock of the corporation, and hence the right to the surplus from the liquidation, passed to petitioner. At trial, the district court accepted this argument, finding that in exchange for the stock transfer, respondent received a

promise that petitioner would pay the remaining debts of the corporation. Included within these debts were substantial amounts owed directly to respondent, either personally or as his mother's heir.

Much of the evidence at trial focused on the existence and terms of the alleged agreement. Petitioner argued that a valid contract existed abrogating respondent's right to the surplus from the corporation, and that (as the district court found), the consideration for the transfer was the promise to pay the debts of the corporation. Respondent argued that no agreement was reached and that, if one was reached, he did not receive the promised consideration.

The district court found in favor of petitioner and dismissed the Complaint in its entirety. On appeal, the court of appeals agreed in large part with the district court's reasoning. Nonetheless, it reversed because the district court failed to award respondent judgment for those sums owed to respondent which were legitimate debts of the corporation. It found that this basis for relief, although not expressly contained in respondent's pleadings (since respondent was arguing against the existence of the agreement) had been tried by the mutual consent of the parties. It therefore ordered judgment in favor of respondent in the amount of the debts of the corporation owed to him directly or as his mother's heir.

REASON WHY THE WRIT SHOULD BE DENIED

This case is fact specific. The court of appeals, relying on F.R.Civ.Pro. 15(b), 54(c), found that the parties "fairly tried," App. A at 25, the issue of respondent's right to the consideration promised in the agreement. It based this conclusion on a review of the transcript at trial (it was a court trial), all of the

exhibits introduced, and the pleadings and briefs filed by the parties. Petitioner's argument that important "procedural due process" considerations are at issue, Pet. at 6-10, is nothing but a quarrel with the court of appeals' conclusions. At trial, petitioner argued for the existence of the agreement and asserted that the consideration for it consisted of a promise to pay the debts of the corporation including those owed to respondent. A great deal of evidence was presented on this issue, and numerous arguments were made by both sides. Reviewing this testimony and evidence, the court of appeals found that the parties had impliedly tried the issue of respondent's right to recovery of the personal consideration. Review by this Court would entail nothing more than passing over the correctness of the court of appeals' legal and factual conclusions in this regard.

Petitioner also claims that an important legal question is presented by suggestion that the lower courts have used different principles in deciding whether to apply F.R.Civ.Pro. 15(b). Pet. at 12-16. As even a casual glance at these cases indicates, however, there is no inconsistency whatsoever in the various articulations of when F.R.Civ.Pro. 15(b) should apply. The lower courts are not in conflict about what legal principles must be considered in applying F.R.Civ.Pro. 15(b). While different courts might not apply F.R.Civ.Pro. 15(b) in the same manner, that difference is not traceable to any confusion over the proper legal standards.

Petitioner also claims that a new party, the Estate of Minnie Ehrichs, was *sua sponte* added by the court. This claim is not factually tenable. No parties were added by the court of appeals. It simply ordered

judgment in favor of respondent for amounts owed to him as his mother's heir. As before, this issue was fully addressed by the parties at trial.

CONCLUSION

This case presents no substantial federal question nor is there any jurisdictional conflict over the applicable law. Review by this Court would amount to nothing more than an assessment of the correctness of the court of appeals' conclusion. Accordingly, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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